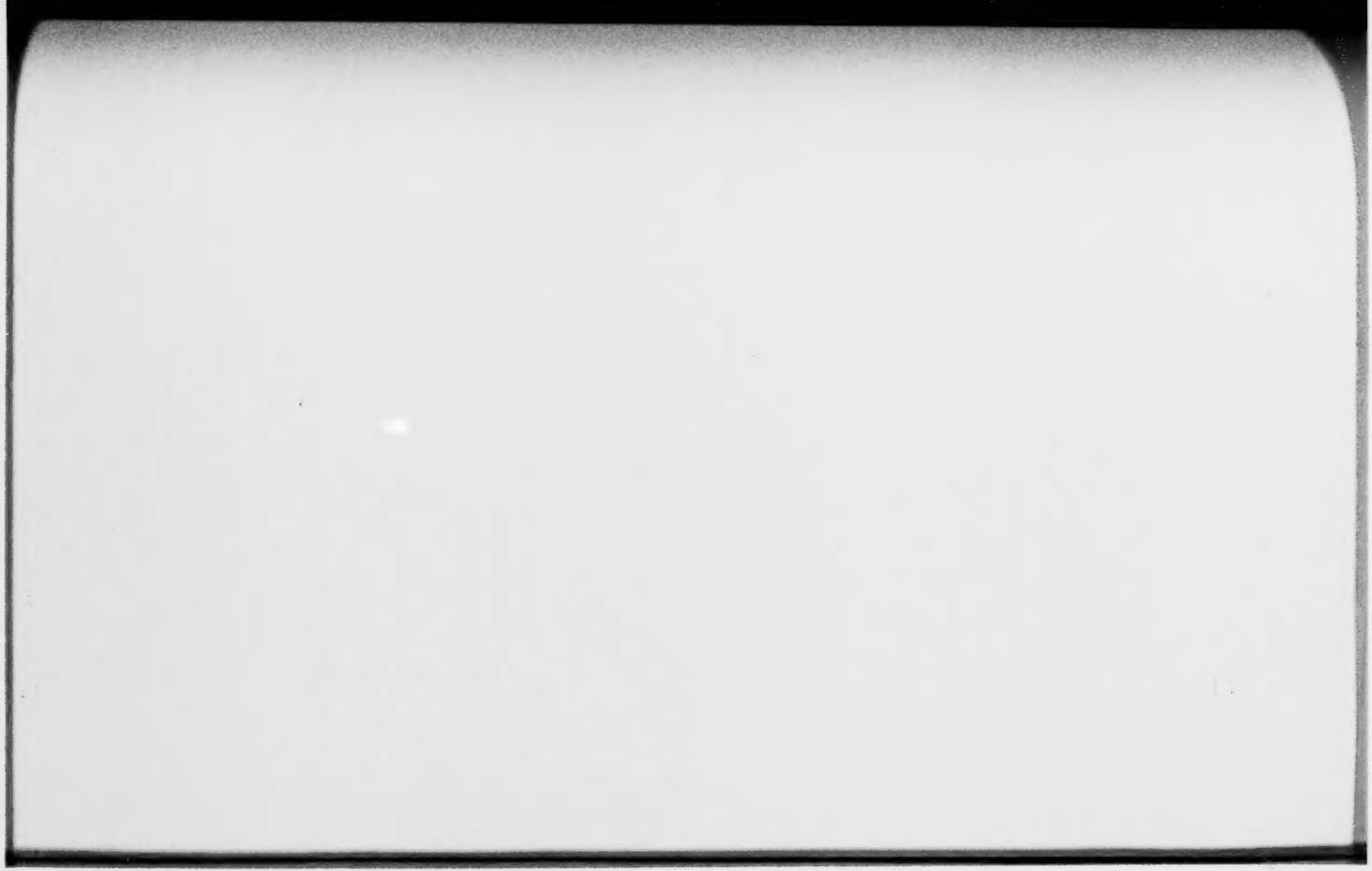

TABLE OF CONTENTS

Index to Authorities

Supreme Court of The United States

OCTOBER TERM, 1942

No. 425

LUKE MANION,

Petitioner,

vs.

STATE OF MICHIGAN AND G. DONALD KENNEDY,
MICHIGAN STATE HIGHWAY COMMISSIONER.

APPELLEES' BRIEF OPPOSING PETITION FOR CERTIORARI

I

Opinions Below

The opinion of the Supreme Court of Michigan and the dissent of its chief justice were published subsequent to the filing of the petition for certiorari,

Manion v. State et al., 5 NW [2d] 527.

II

Questions Presented

The preliminary question for decision may be stated thus:

Where the highest court of the State of Michigan in contemplation of an act of her legislature that in general terms permits her to be sued in a 'court of claims' created solely for that purpose,[*] has construed express provisions thereof to mean 'that the State's immunity from liability while engaged in a governmental function is preserved because the waiver of this defense would enlarge the "present liabilities of the State" ',[†]

holding:

that the terms of the State's consent [to be sued, provided in the act] define the jurisdiction of the 'court of claims' thus created, to entertain the suit at bar,—

that the State is not liable [in this instance] because of its sovereign immunity from liability in the performance of a governmental function and not because of its sovereign immunity from suit,—

---

[*]

It is provided in Michigan's Constitution that the Board of State Auditors 'shall examine all claims against the State not otherwise provided for by general law' [Article VI, § 20, State Constitution].

[†]

Section 24 of the Michigan 'court of claims act', so construed, reads: "This act shall in no manner be construed as enlarging the present liabilities of the State and any of its departments, commissions, boards, institutions, arms or agencies" [§ 24].

that the 'court of claims', by the limitations expressed in the act creating it, does not possess the jurisdiction of a court of admiralty, nor does it have a 'general capacity to stand in judgment',—

that the State has not waived its immunity from suit for a maritime tort in the courts of the United States,—

and that the reasoning of *Workman v. City of New York*, 179 U. S. 552, 'should be limited to actions on maritime torts against those municipalities which, like the City of New York, have the capacity to sue and be sued' [and has no application to State sovereignty],—

is the Supreme Court of the United States bound by such statutory construction, or can it be said that a federal question is presented?

Act No. 135, §§ 2, 8, 24, Pub. Acts of Michigan 1939 (5 Comp. Laws of Michigan 1929, Mason's 1940 Cumulative Supplement, §§ 13862-2, 13862-8, 13862-24 [Stat. Ann., 1942 Cum. Supp., §§ 27.3548-2, 27.3548-8, 27.3548-24]).

Constitution of the United States, Article I, § 8, Article III, § 2, and the Eleventh Amendment.

Judicial Code of the United States, § 24 [28 USCA, § 41-3]; the 'Jones Act' [46 USCA, § 688] and the Federal 'Employers Liability Act', incorporated in the 'Jones Act' by reference [45 USCA, §§ 53, 54, 55, 56 and 57].

III

Summary Statement of the Matter Involved

The following statement is deemed necessary in correcting certain inaccuracies and omissions in the petition for certiorari [Supreme Court Rule No. 27 (3)].

The Supreme Court of Michigan in the cause below undertook to construe the local statutory provisions about which the conflict revolved [Michigan 'Court of Claims Act' *supra*, § 24]:

> "Sec. 24. This act shall in no manner be construed as enlarging the present liabilities of the State and any of its departments, commissions, boards, institutions, arms or agencies".

The respondents (State of Michigan and her highway commissioner, defendants below) do not concede that, by the 'Court of Claims Act' *supra*, Michigan's sovereign immunity from suit brought against her in that court was and is '*unconditionally*' waived. Rather is it our position that while in general terms this statute [§ 8] permits the State to be sued in a special legislative court created solely for that purpose [§ 2], section 24 thereof, as construed by the highest court of the State, excludes from the jurisdiction of the 'Court of Claims' any claim arising from the negligence or carelessness of an officer, servant, agent or employe of the State in the performance of a governmental function.

In short, the State of Michigan has not given her express consent to be sued for the commission of such a tort; and, in granting permission to be sued, the legislature of a sov-

ereign State [as distinguished from a municipal corporation having power to sue and be sued] may set limits upon the jurisdiction of a 'court of claims', and such a jurisdiction, so defined by local State law, cannot be extended by federal statutes enacted in exertion of power under the 'maritime law' (Federal Constitution, Article III, § 2; Judicial Code, § 24-3 [28 USCA, § 41-3]; the 'Jones Act', § 20 [46 USCA, § 688], incorporating by reference certain provisions of the Federal 'Employers Liability Act' (Railroads) [45 USCA, §§ 53, 54, 55, 56 and 57].

IV

ARGUMENT

POINT ONE

The Michigan 'Court of Claims Act', § 24, supra, as construed by the highest court of that State, preserves the State's immunity from liability while engaged in a governmental function, and thereby limits the causes for which suit may be brought, thus excluding from the jurisdiction of the 'Court of Claims' all actions based upon liability for the negligent acts of her agents, servants or employes engaged in the performance of governmental functions.

First: Statutes permitting suits against the State, being in derogation of its sovereignty, must be strictly construed,

25 R.C.L., States, § 52, p. 416,

United States v. Sherwood, 312 U. S. 584,

and in granting such permission the legislature of a State may impose conditions and define the limitations of jurisdiction.

When this principle was recently applied to suits brought against the United States of America,

> *United States v. Sherwood, supra* [312 U. S. 584, 586, 587, 591],

Mr. Justice Stone, speaking for the Court, had occasion to say:

> "The United States, as sovereign, is immune from suit save as it consents to be sued [citing authorities], and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit (citing cases)".

Again [p. 587]:

> "The Court of Claims is a legislative, not a constitutional, court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the Congressional power 'to pay the debts . . . of the United States', which it is free to exercise through judicial as well as non-judicial agencies (citing authorities). It is for this reason, and because of the power of the sovereign to attach conditions to its consent to be sued, that Congress, despite the Seventh Amendment, may dispense with a jury trial in suits brought in the Court of Claims".

And [p. 591]:

> "The matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the

> issues to be adjudicated in the suit, to those between the claimant and the Government. The jurisdiction thus limited is unaffected by the Rules of Civil Procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction".

This doctrine of the *Sherwood* case upon which the Michigan Supreme Court relied, has been evoked by many States of the Union to protect their rights of sovereignty:—

> ". . . . If the State consents to be sued, it is only in the manner it prescribes. And all persons seeking to avail themselves of the privilege must accept it subject to the terms and conditions attached thereto or forming a part of the right as granted by the State. Thus, the State has a right . . . . to limit the right to sue to certain specified causes. . . . Statutes permitting suits against the State must be strictly construed, being in derogation of its sovereignty",
>
> 25 R.C.L., States, § 52, p. 416.

It has been said that permission to sue the State is in the nature of an offer 'which must be accepted as made',

> *Innes v. McColgan* (Cal. App.), 126 P [2d] 930,

that if the legislature sees fit to permit the State to be sued, it may, by general law, prescribe the class or classes of cases and the terms and conditions upon which suit may be brought,

> *State v. Love,* 99 Fla. 333, 126 So. 374,

and a State's consent to be sued on contracts of the state highway commissioner is deemed not to include consent to

the attachment of warrants, held by the state highway commissioner, payable to a highway contractor,

Barker v. Hufty Rock Asphalt Co., 136 Kan. 834.

So, too, the high court of Mississippi has held that a statute of that State, when authorizing suit against an agency of the State, is the measure of power to sue; a general statutory authorization to sue a governmental subdivision or agency creates no liability, and a suit is maintainable thereunder only for a liability authorized by statute,

State Highway Commission v. Gulley, 167 Miss. 631, 145 So. 351.

The Texas Court of Civil Appeals, in an action against the State for damages for the death of a minor which occurred in an automobile collision accident, held as follows:

"(Syl. 1) The State of Texas is not liable in damages for the negligence or misfeasance of its officials, agents or employees, unless such liability is voluntarily assumed by an act of the legislature".

"(Syl. 2) The 'respondeat superior doctrine' has no application to the State of Texas, its exemption being based on its sovereign character".

"(Syl. 6) The legislature is authorized to waive the State's immunity for negligence of its agents, but its intention to do so should appear by clear and unambiguous lanuage".

"(Syl. 7) The statute making a 'municipal corporation' liable for death of any person caused by wrongful act, neglect, carelessness or default of its agents or servants does not waive the State's immunity from liability for negligence of its agents, since the words

'municipal corporation' in the statute do not include the State",

Welch v. State (Tex. Civ. App.-1941), 148 S.W. [2d] 876.

The supreme court of Washington has said:

"It is well settled that an action cannot be maintained against the State without its consent, and that the State, when it does so consent, can fix the place in which it may be sued, limit the causes for which the suit may be brought, and define the class of persons by whom it can be maintained. In other words, the State being sovereign, its power to control and regulate the right of suit against it is plenary; it may grant the right or refuse it as it chooses, and when it grants it may annex such condition thereto as it deems wise, and no person has power to question or gainsay the conditions annexed",

State, ex rel. Pierce County, v. Superior Court, 86 Wash. 685. 151 Pac. 108,

and later followed this decision in principle,

State v. Superior Court, 9 Wash [2d] 309, 114 P [2d] 1001.

Cf. *Robison v. State,* 263 App. Div. 240, 32 NYS [2d] 388.

Second: The Supreme Court of Michigan rested decision in this cause on two major premises: [1st] the State's sovereign immunity from liability for the negligent acts of her servants, agents and employes while engaged in performance of a governmental function, holding that such immunity was preserved by the 'court of claims act' (§ 24); and [2d] by the same token, the Court was of the opinion that the provisions of § 24 also demarcate jurisdiction of the 'Court of Claims'.

Although the Michigan Supreme Court recognize a clear distinction between 'sovereign immunity from suit' and 'sovereign immunity from liability', and refer to the latter as a 'defense' preserved by § 24 of the act,[*] a close reading of the prevailing opinion will disclose that decision also turned upon a lack of jurisdiction in the 'Court of Claims'.[†]

---

[*]

"There is a distinction said the Court between sovereign immunity from suit and sovereign immunity from liability. The latter exists when the sovereign is engaged in a governmental function. The former may be waived without a waiver of the latter".

"I construe this (§ 24 of the act) to mean that the State's immunity from liability while engaged in a governmental function is preserved because the waiver of this defense would enlarge the 'present liabilities of the State' ".

"The State is not liable in this instance because of its sovereign immunity from liability in the performance of a governmental function and not because of its sovereign immunity from suit".

[†]

But the court also say: (concerning jurisdiction)

"The terms of the State's consent to be sued in any court define that court's *jurisdiction* to entertain the suit,

United States v. Sherwood, supra [212 U. S. 584].

The 'court of claims' is a legislative and not a constitutional court and derives its powers only from the act of the legislature and ***subject to the limitations therein imposed.*** The existing liabilities of the State were not enlarged by the court of claims act. [See § 24 thereof]. All those defenses which might have been interposed in actions of law and chancery remain unchanged save only the immunity from suit" [Emphasis supplied].

"The court of claims, ***by the limitations expressed in the act creating the court,*** does not possess the jurisdiction of a court of admiralty; nor does the State have 'a general capacity to stand in judgment' . . . . Nor has the State waived its immunity from suit for a maritime tort in the courts of the United States".

Whether the Supreme Court of Michigan, in construing the 'court of claims act', proceeded on the theory that considerations of State sovereignty bar recovery in this case because of 'immunity from liability', or because of 'immunity from suit', the result is the same, for the court also drew attention to the fact that the State Constitution [Article VI, § 20] provides:

> "Sec. 20. The secretary of state, state treasurer, and commissioner of the state land office shall constitute a board of state auditors. They shall examine and adjust *all claims* against the State not otherwise provided for by general law" . . . .

Thus, while the Constitution itself, in plain and unambiguous language, permits the legislature to provide by general law for the examination and adjustment of any claim against the State [by such an agency as it may create], it requires that the legislature, in exertion of such a power, shall clearly define the nature and character of the claims thus to be examined and adjusted; and if, in creating a 'court of claims' for that purpose, the legislature [as it did in this instance] excludes actions or claims arising from acts of negligence in the performance of governmental functions [§ 24, as construed by the court], then it follows that the 'court of claims' so created is without jurisdiction to entertain them. In such an event, the constitutional board of state auditors retains exclusive jurisdiction.

It is, of course, axiomatic that the Supreme Court of the United States consider themselves bound by such a statutory construction as we have here.

Where the decision of a State court rests upon 'an inde-

pendent ground adequate to sustain it and in harmony with an asserted federal right, there is no denial of that right',

Rogers v. Hennepin County, 240 U.S. 184.

Where, as at bar, the judgment rests upon two grounds, one involving a federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, the United States Supreme Court will not take jurisdiction,

Cuyahoga River Power Co. v. Northern Realty Co., 244 U.S. 300,

Fox Film Corporation v. Muller, 296 U.S. 207,

Cf. *Municipal Investors Ass'n v. Birmingham,* 316 U.S. 153.

This rule has been stated to be that this Court is without jurisdiction to review a State court's decision construing the statutes of its own State,

Neblett v. Carpenter, 305 U.S. 297,

Alton R. Co. v. Illinois Commerce Commission, 305 U.S. 548.

Moreover, the highest court of a State is the ultimate judge of the extent of its jurisdiction, and unless a denial of a federal right is involved, its decision upon that subject is final and conclusive,

Dayton Coal & Iron Co. v. Cincinnati, New Orleans, & Texas Pacific R.R. Co., 239 U.S. 446.

POINT TWO

The decision below does not deny a federal right, for the 'maritime law' of the United States (Federal Constitution, Article I, § 8, Article III, § 2, as limited by the Eleventh Amendment) cannot operate to destroy State sovereignty.

Although in ordinary suits between private parties, or even in actions against a municipal corporation which has general power to sue and be sued in any court,

Workman v. City of New York, 179 U.S. 552,

the maritime law of the United States, or the 'law of the sea', as it is sometimes called, is supreme, and in such actions Federal and State courts have concurrent jurisdiction by virtue of the Judicial Code, § 24-3 (28 USCA, §41-3), and the 'Jones Act', § 20 (46 USCA, § 688), has extended to seamen certain privileges created by the 'Employers Liability Act' (45 USCA, §§ 53, 54, 55, 56, 57),

Engel v. Davenport, 271 U.S. 33,

Panama Railroad Co. v. Vasquez, 271 U.S. 557,

Lindgren v. United States, 281 U.S. 38,

The Arizona v. Anelich, 298 U.S. 110,

we respectfully submit the People never intended to delegate or surrender to the Congress [United States Constitution, Article III, § 2] unrestricted power [Eleventh Amendment] to superimpose that system upon the States themselves in derogation of their sovereign immunity from suit or sovereign immunity from liability.

Petitioner's counsel does not deny that, in the operation of ferries across the Straits of Mackinac, in connection with Michigan's highway system, the officers, agents, servants and employes of the State were performing a governmental function; the Supreme Court of Michigan so held, and no error is assigned thereon.

It is well-established that a sovereign State is not liable for the torts of its officers, agents, servants or employes, committed in the performance of governmental functions, and that legislative intent to waive this immunity must be expressed in clear and unambiguous language,

59 Corpus Juris, States, § 339, citing

Collins v. Commonwealth, 262 Pa. 572, 106 Atl. 229,

and 'if the State consents to be sued, it is only in the manner it prescribes',

Murray V. Wilson Distilling Co., 213 U.S. 151,

and see cases cited under 'Point One' of this brief.

The Supreme Court of Michigan has repeatedly announced this general rule of non-liability for torts,

Gilboy v. Detroit, 115 Mich. 121,

Shipman v. State Livestock Commission, 115 Mich. 488,

Gunther v. County Road Commissioner, 225 Mich. 619,

Longstreet v. County of Mecosta, 228 Mich. 542,

Baszkiewcz v. Board of Education of Detroit, 301 Mich. 212, 3 NW [2d] 71.

Chloa Mead, Admrx v. State of Michigan and Public Service Commission, decided by Supreme Court of Michigan, October 21, 1942.

A general statute authorizing suits against the State does not permit recovery for torts of its officers, agents, or servants,

Locke v. State, 140 N.Y. 480,

Smith v. State, 227 N.Y. 405, 125 N.E. 841, 13 ALR 1264,

Wilson v. State Highway Commissioner (Va., 1939), 4 SE [2d] 746,

Holzworth v. State (Wis.), 298 N.W. 163.

Petitioner's counsel argues that because of the necessity for uniformity and harmony in the operation of the 'maritime law', this Court has freed that code from any measure of State control; therefore [it is said] once the State has consented to be sued in any forum, it may no longer claim 'immunity from *liability*' for the maritime torts of its officers, agents, servants, or employes; and he relies entirely upon the principle that guided this Court in arriving at its decision in

Workman v. New York City, 179 U.S. 552.

We respectfully submit that the *Workman* case, however applicable to a municipal corporation sued in a court of admiralty for a maritime tort, does not go so far as counsel would believe.

And there are other cases which go contrary to counsel's views.

In the *Workman* case, *supra*, the decision was that a municipal corporation which possesses the general power

to sue and be sued may not, in a court of admiralty having jurisdiction under the Federal Constitution (Article III, § 2) successfully raise the bar of sovereign immunity from liability for the torts of its servants, agents, and employes; for in such a case the 'maritime law' of the Nation controls.

It is noteworthy that the case of *Workman* was instituted in a federal court of admiralty jurisdiction engaged primarily in enforcing the 'maritime law', and that this Court in its prevailing opinion repeatedly emphasizes this fact. [*]

Speaking of the evils which would flow from an affirmative answer to the question presented, this Court say:

> "This (a lack of harmony and uniformity) must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing

---

[*]

After stating the facts, the Court defined the questions presented for decision:

"We come then to consider first, whether, in the decision of the controversy, the local law of the city of New York or the maritime law should control; and second, if the case is governed by the maritime law, whether the city of New York is liable. In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not — as was the case in *Detroit v. Osborne* (1890), 135 U.S. 492, . . . — whether the local law governs as to a controversy arising *in the courts of the common law* or of equity of the United States, but, does the local law, if in conflict with the maritime law, *control a court of admiralty of the United States in the administration of maritime rights and duties*, although judicial power with respect to such subjects has been expressly conferred by the Constitution (article 3, § 2) upon the courts of the United States"?

that *those who are amenable to the jurisdiction of courts of admiralty* are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility therefor". (Emphasis supplied). [†]

Again, it is said:

When discussing many of the earlier cases cited in the opinion, this Court observes the duty of '*admiralty courts*' to

> "administer redress for every maritime wrong *in every* case where they (courts of admiralty) *have jurisdictional power over the person by whom the wrong has been committed*". (Emphasis is ours).

And the final conclusion is reached:

> "It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability *in a court of admiralty, where the court has jurisdiction.* This being so, it follows that as the municipal corporation of the City of New York, *unlike a sovereign*, was subject to the jurisdiction of the court, the claimed exemption from liability. . . . was without foundation in the maritime law, and therefore afforded no reason for denying redress in a court of admirality". (Italics, ours).

[†]

"Potential, however, as may be these arguments, predicated on the inherent injustice of the doctrine contended for, ... we are not thereby relieved from considering the question in a more fundamental aspect. In doing so, it becomes manifest that the decisions of this Court overthrow the assumption that the local law or decisions of a State can deprive of all rights to relief, in a case where redress is afforded by the maritime law, and is sought to be availed of *in a cause of action maritime in its nature and depending in a court of admiralty of the United States*". (Italics, ours).

Boiled down, the opinion seems to be based on the proposition that in the exercise of jurisdiction and power delegated to the judiciary of the United States by the Constitution [Article III, § 2], courts of admiralty will not sanction the doctrine of immunity from liability when such a defense is made by a municipal corporation over which an admiralty court of the United States has lawful jurisdiction.

This rule or principle cannot, we submit, be applied to a sovereign State of the Union.

While this Court has not passed upon the precise question now presented for determination, we find authority for our position in an opinion written by Judge Learned Hand when sitting in the district court of the United States for the southern district of New York,

The Onteora (1923), 298 Fed. 553.

There, the court held that the commissioners of (New York State's) Palisades Interstate Park were exempt from liability (as a *state* agency) as a tort-feasor, notwithstanding that they were a corporation created by the laws of the State of New York, and subject to suit, and the fact that the suit was in admiralty made no difference.

Judge Hand said, in part:

> "The libelant's argument is that the corporate form given to the claimants, together with their express subjection to suit, shows an intention to make them generally liable like a *municipality*, and that municipalities, except in their governmental functions, are liable as tort-feasors (citing authorities). *But the distinction in respect of municipalities has never been*

applied to a State, which can be made liable only when it has given an express consent. Moreover, the claimants are not *a municipality,* as I have said, though a 'body politic'. Besides, *the argument that consent to be sued carries by implication the recognition of a liability in tort was met and denied in Smith v. State, supra* (227 N.Y. 405). Finally, the fact that this is a suit in admiralty makes no difference. *Ex Parte State of New York,* No. 1, 256 U.S. 490. . . Therefore, I think that the case fails, because there is no liability *in personam,* and hence no maritime lien arising from what would be a tort if committed by a private vessel". (emphasis supplied).

The foregoing opinion is in harmony with the general rule that vessels in the public service of a State are not subject to a suit in admiralty,

2 Corpus Juris., Secundum, Admiralty, § 19,

Ex Parte New York, 256 U.S. 490, 503,

The Charlotte, 285 Fed. 84 (affirmed, 299 Fed. 595; certiorari denied, 266 U.S. 604).

V

Conclusion

We respectfully submit, on the bases of the reasons assigned in this brief, that the writ of certiorari should be denied.

Respectfully Submitted,

HERBERT J. RUSHTON,
Attorney General for the
State of Michigan
Counsel for Respondents

End